Supreme Court, U.S.
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No. 91-611

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

KEYTON E. BARKER AND PAULINE BARKER, *ET AL.*,
PETITIONERS,

VS.

STATE OF KANSAS; KANSAS DEPARTMENT OF REVENUE;
SECRETARY OF REVENUE OF THE STATE OF KANSAS;
AND DIRECTOR OF TAXATION OF THE STATE OF KANSAS,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 10, 1991
CERTIORARI GRANTED NOVEMBER 27, 1991

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Apr. 17, 1989 - Plaintiffs' original petition [Dist. Ct. Case No. 89-CV-666] filed in the District Court of Shawnee County, Kansas (the "*Barker*" case); Plaintiffs' original petition [Dist. Ct. Case No. 89-CV-1100] filed in the District Court of Leavenworth County, Kansas (the "*Lober*" case).

Apr. 18, 1989 - Plaintiffs' first amended petition filed in *Barker*.

May 18, 1989 - Defendants' original answer filed in *Barker*.

May 19, 1989 - Defendants' original answer filed in *Lober*.

June 14, 1989 - Journal Entry filed in Dist. Ct. Case No. 89-CV-1100 changing venue of *Lober* to the District Court of Shawnee County, Kansas.

Aug. 3, 1989 - Motion of Anthony Corcoran to intervene and original petition in intervention filed in *Barker*.

Aug. 10, 1989 - Plaintiffs' motion for leave to file a second amended petition filed in *Barker*.

Aug. 29, 1989 - Journal Entry filed in Dist. Ct. Case No. 89-CV-1100 consolidating *Lober* with the *Barker* case in Division No. 4 of the District Court of Shawnee County, Kansas.

Sept. 21, 1989 - Journal Entry filed permitting *Barker* plaintiffs to file a second amended petition; Journal Entry filed permitting Anthony Corcoran to intervene in *Barker*.

Sept. 22, 1989 - Plaintiffs' second amended petition filed in *Barker*.

Sept. 28, 1989 - Plaintiffs' joint motion for class certification filed.

Oct. 24, 1989 - Plaintiffs' amended joint motion for class certification filed.

Nov. 1, 1989 - Journal Entry filed dismissing Governor Hayden as a party defendant in *Barker*.

Dec. 19, 1989 - Journal Entry filed denying Defendants' motion to dismiss and granting Plaintiffs' amended motion for class certification.

Feb. 23, 1990 - Plaintiffs' motion for summary judgment on the question of liability filed.

Oct. 31, 1990 - Memorandum Decision and Order filed denying Plaintiffs' motion for summary judgment and entering judgment in favor of Defendants; Plaintiffs' notice of appeal filed.

Nov. 19, 1990 - Order filed transferring appeal to the Kansas Supreme Court.

July 12, 1991 - Opinion and judgment of the Supreme Court of the State of Kansas filed.

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION 4

KEYTON BARKER and WILLIAM RICHARDS, SR.,
for themselves and all others similarly situated
Plaintiffs,

v.

STATE OF KANSAS and KANSAS
DEPARTMENT OF REVENUE
Defendants.

PETITION
[Case No. 89-CV-666]

Filed April 17, 1989

Plaintiffs Keyton Barker and Williams Richards, Sr., for themselves and all others similarly situated, hereby allege and state as follows:

1. Plaintiff Keyton Barker ("Barker") is a citizen and domiciliary of Shawnee County, Kansas. Mr. Barker is a retired Noncommissioned Officer (NCO) of the United States who served 22 creditable years in the United States Army and attained the rank/grade of Sergeant First Class (SFC)/E-7 before retiring from the active military service in February 1968. Pursuant to applicable provisions of Title 10 of the United States Code, Plaintiff Barker has been and will continue to be a recipient of federal armed forces retirement benefits based upon his rank and years of service.

2. Plaintiff William Richards, Sr. ("Richards") is a

citizen and domiciliary of Shawnee County, Kansas. Mr. Richards is a retired Commissioned Officer of the United States who served more than 27 creditable years in the United States Army and attained the rank/grade of Lieutenant Colonel (LTC)/O-5 before retiring from the active military service on July 1, 1970. Pursuant to applicable provisions of Title 10 of the United States Code, Plaintiff Richards has been and will continue to be a recipient of federal armed forces retirement benefits based upon his rank and years of service.

3. Plaintiff class sought to be certified herein consists of all retired members of the federal armed forces residing in the State of Kansas who are past, present and/or future recipients of federal retirement benefits (under applicable provisions of Title 10 of the United States Code) which have been and remain subject to state income taxation. Upon information and belief, Plaintiffs Barker and Richards allege that there are more than 10,000 members of this class.

4. Defendant State of Kansas ("State") is a duly recognized and admitted state of the Union of the United States of America and may be served with process by serving Robert T. Stephan, Attorney General of the State of Kansas, Kansas Judicial Center, 301 W. 10th Street, Topeka, Kansas 66612.

5. Defendant Kansas Department of Revenue ("Department of Revenue") is an agency and instrumentality of the State of Kansas created and existing under the authority of K.S.A. 75-5101 *et seq.* and any amendments thereto, and may be served with process by serving Ed Rolfs, Secretary of Revenue of the State of Kansas, Docking State Office Building, 915 S.W. Harrison Street, Topeka, Kansas 66612.

FACTUAL BACKGROUND

6. Pursuant to pertinent provisions of the Kansas Income Tax Act (K.S.A. 79-3201, *et seq.* and amendments thereto), Plaintiffs have been required to pay and have paid state

income taxes on their federal retirement benefits during each year from 1984 through the present.

7. At all times relevant since 1984, the Department of Revenue has collected, received and disposed of such income tax payments under the color of state law for and on behalf of the State of Kansas.

8. Pursuant to the provisions of K.S.A. 79-32,117(c)(11) and K.S.A. 74-4923(b), together with amendments thereto, all retirement benefits paid by the State under the Kansas public employees retirement system (K.S.A. 74-4901 *et seq.* and amendments thereto) and the Kansas Police and Firemen's Retirement System (K.S.A. 74-4951 *et seq.* and amendments thereto) have been specifically exempt from state income taxation during each year from at least 1984 through the present. In addition, amounts received as annuities under the federal civil service retirement system; amounts received by retired railroad employees as supplemental annuity benefits; and amounts received by retired employees of a city and by retired employees of any board of such city in accordance with K.S.A. 13-14,106 or exemptions therefrom, have been likewise exempt from state income taxation, under the provisions of K.S.A. 79-32,117(c) and amendments thereto during each year from at least 1984 through the present.

9. The retirement, pension and/or annuity benefits referenced in paragraph 8 above will remain exempt from state income taxation for the indefinite future absent a change in state law. Likewise, the federal retirement benefits received by Plaintiffs will remain subject to state income taxation for the indefinite future absent a change in state law or judicial decree.

10. Such inconsistent treatment of retirement benefits for state income tax purposes constitutes discriminatory taxation which is neither directly related to nor justified by significant differences between the classes of retirees. Consequently, state income taxation of Plaintiffs' federal retirement benefits violates

4 U.S.C. § 111 and constitutional principles of intergovernmental tax immunity as discussed and applied in *Davis v. Michigan Department of Treasury*, No. 87-1020, 57 U.S.L.W. 4389 (U.S. Sup.Ct., Mar. 28, 1989).

11. Pursuant to K.S.A. 60-223, Plaintiffs Barker and Richards seek to represent the class of all persons similarly situated which is identified and defined in Paragraph 3 above. Plaintiffs Barker and Richards are members of the proposed class; their claims are typical of the claims of all class members; and they will fairly and adequately represent and protect the interests of all class members.

12. Since Plaintiffs are informed and believe that the proposed class will consist of more than 10,000 retired members of the federal and armed forces residing in Kansas, joined of all such class members is impracticable. Moreover, questions of law and fact common to members of the class predominate over any questions affecting individual members, and a class action is superior to all other available methods for securing a fair and efficient adjudication of this controversy.

COUNT I - DEPRIVATION OF FEDERAL CIVIL RIGHTS

13. The allegations articulated in Paragraph 1 through 12 above are hereby incorporated by reference as though fully set forth herein.

14. Defendant Department of Revenue, by and through its Secretary, Director of Taxation, officers, agents and employees acting under the color of state law, has subjected Plaintiffs or caused Plaintiffs to be subjected to the deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States in violation of 42 U.S.C. § 1983.

15. As a result of such deprivation of federally-protected civil rights, Plaintiffs and the class they seek to represent have suffered substantial monetary damages and will continue to

suffer such damages on a quarterly and/or annual basis absent permanent injunctive relief which prohibits the Department of Revenue (including its Secretary, Director of Taxation, agents and employees) from taking any direct or indirect action to subject Plaintiffs' federal retirement benefits to state income taxation.

COUNT II - DECLARATORY JUDGMENT

16. The allegations articulated in Paragraphs 1 through 15 above are hereby incorporated by reference as though fully set forth herein.

17. An actual case and controversy exists between the parties under the provisions of K.S.A. 60-1701 *et seq.* regarding the arbitrary and discriminatory taxation of Plaintiffs' federal retirement benefits under the Kansas Income Tax Act. Absent judicial declaration that the state income tax act is unconstitutional as applied; and that federal armed forces retirees are not exempt from paying state income tax on their federal retirement benefits, Plaintiffs and the class they seek to represent will be severely and adversely affected, and will be caused to suffer severe financial damages in the future.

COUNT III - ACCOUNTING AND REFUND OF STATE INCOME TAXES ON FEDERAL RETIREMENT BENEFITS

18. The allegations articulated in Paragraphs 1 through 17 above are hereby incorporated by reference as though fully set forth herein.

19. Defendant State has subjected Plaintiffs and the class they seek to represent to arbitrary and discriminatory income taxation of federal retirement benefits since at least 1984. At all times pertinent hereto, Defendant Department of Revenue has collected and received income tax revenues from said federal retirement benefits; and Plaintiffs, including the class they seek to represent, have paid such arbitrary and discriminatory state income

taxes on such federal retirement benefits.

20. Under the circumstances presented, Plaintiffs and the class they seek to represent are entitled to an accounting of all such discriminatory income taxes collected from 1984 through the present and to a refund, together with appropriate interest at the rate of 12% per year from the date(s) of overpayment, of all such monies.

21. While Plaintiffs acknowledge the existence of certain administrative remedies to obtain state income tax refunds, such mechanisms are plainly inadequate and recourse to such procedures would be futile under the circumstances.

22. Plaintiffs and the class they seek to represent are entitled to state income tax refunds, together with interest, in substantial amount which probably exceeds $1,000,000.00 per year for each tax year from 1984 through the present.

PRAYER FOR RELIEF

WHEREFORE, premises considered, Plaintiffs pray for the following relief:

A. That the Court determine, as soon as practicable, that this case is a proper class action; that Plaintiffs Barker and Richards are proper class representatives; and that no notice of this action need be given to members of the class represented by these named plaintiffs, all in accordance with K.S.A. 60-223;

B. That the Court issue its judicial declaration that the Kansas Income Tax Act is unconstitutional as applied to Plaintiffs' federal retirement benefits; that Defendants, under the color of state law, have wrongfully subjected Plaintiffs or caused Plaintiffs to be subjected to arbitrary and discriminatory income taxation in violation of the Constitution and laws of the United States from at least 1984 through the present; and that Plaintiffs' federal retirement benefits have been and continue to be exempt from state

income taxation under the circumstances; that Plaintiffs are not required to pay state income taxes on their federal retirement benefits in the future; and that Plaintiffs are entitled to a refund of all discriminatory state income tax revenues paid and/or collected since 1984 in connection with their federal retirement benefits, together with appropriate interest at the rate of 12% per year until paid in full;

C. That the Court enter a permanent injunction prohibiting the State of Kansas, the Department of Revenue, and all officers, agents and employees thereof from assessing and/or collecting state income taxes on Plaintiffs' federal armed forces retirement benefits;

D. That the Court order the Department of Revenue to account to Plaintiffs and the class they seek to represent for all state income tax revenues collected or received since 1984 because of the taxation of Plaintiffs' federal retirement benefits;

E. That the Court enter judgment for Plaintiffs and the class they seek to represent, and against Defendants State of Kansas and Department of Revenue, for state income tax refunds to which Plaintiffs and Plaintiff class are entitled for each tax year from 1984 through the present, together with interest, in a total amount exceeding $10,000.00; and

F. That the Court award Plaintiffs their costs, including reasonable attorney fees under 42 U.S.C. § 1988, and for such other and further relief as may be deemed just and equitable under the circumstances.

* * * * * * * *

IN THE DISTRICT COURT OF
LEAVENWORTH COUNTY, KANSAS

WILLIAM H.LOBER and MARJORIE E. LOBER, husband

and wife, EDWARD F. KELLOGG and RENATE O. KELLOGG, husband and wife, ROGER J. OLSON and NANCY W. OLSON, husband and wife, ROGER W. CLAY and BETTY J. CLAY, husband and wife, and LELAND W. KEISTER and PATRICIA K. KEISTER, husband and wife, and others similarly situated
Plaintiffs,

vs.

STATE OF KANSAS, DEPARTMENT OF REVENUE
Defendants

PETITION
[Case No. 89-CV-1100]

Filed April 17, 1989

COME NOW THE PLAINTIFFS, by and through their attorney Terence A. Lober, of counsel with Davis, Beall, McGuire & Thompson, Chartered, and for their cause of action would state and allege:

1. This is a proceeding for a preliminary and permanent injunction (a) enjoining the defendant, State of Kansas. Department of Revenue, from continuing the rule, policy, and practice of exempting from taxation all retirement benefits paid by the State or its political subdivisions, while taxing retirement benefits paid to military retirees by the Federal Government; (b) requiring defendant, State of Kansas, Department of Revenue, to refund taxes previously paid on military retirement benefits.

2. Plaintiffs bring this action as a Class Action on behalf of all military retirees or persons who have been taxed by the State of Kansas in part or in whole on military retirement benefits. Members of the class on behalf of whom plaintiffs sue are so numerous that joinder of all members is impracticable.

However, there are common questions of law and fact affecting the constitutional right of equal protection under the law for military retirees. The claims of plaintiffs are typical of the claims of the class, and plaintiffs fairly and adequately protect the interests of the class. Defendants have acted and have refused to act on grounds generally applicable to the class plaintiffs represent, thereby making appropriate final injunctive relief in favor of plaintiffs and the class. The questions of law and fact common to the members of the class predominate over any questions affecting all the individual members, and therefore, a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

3. The plaintiffs in this case are military retirees or persons who have been taxed by the State of Kansas and are representative of most military retirees in the State of Kansas.

4. Defendant is the Kansas Department of Revenue, a governmental body.

5. Defendant, State of Kansas Department of Revenue, has historically levied a tax upon retirement benefits received by military retirees who claim or have claimed residency in the State of Kansas. Moreover, defendant exempts from taxation all retirement benefits paid by the State or its political subdivisions to retirees claiming residency in the State of Kansas.

6. Defendants are in violation of plaintiffs' constitutional right to equal protection under the law.

7. Defendants are in violation of 4 U.S.C. Section 111 which provides as follows:

> "The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the

officer or employee because of the source of the pay or compensation."

8. The subject tax imposed on plaintiffs is barred by the doctrine of intergovernmental tax immunity and is not justified by significant difference between the two classes of employees.

9. As a result of the defendant's above-stated actions, the plaintiffs are being deprived of income due them as military retirees of the U. S. Armed Forces solely because of the source of the retirement benefits. Military retirees who claim or have claimed residency in Kansas are deprived of equal protection under the law as guaranteed by the equal protection clause of the Fourteenth Amendment to the United States Constitution by the defendant. Such loss and deprivation are likely to cause plaintiffs and members of their class serious and irreparable injury and harm for which they have no claim, adequate or complete remedy to redress these wrongs other than a suit for injunctive relief. Any other remedy would be attended by such uncertainties as to deny substantial relief, and would cause plaintiffs further irreparable injury and occasion damage, vexation and inconvenience.

WHEREFORE, plaintiffs respectfully request (1) this Court enter a mandatory injunction which enjoins defendant, Kansas Department of Revenue, from making a distinction between the retirement benefits paid by the State of Kansas or its political subdivisions and those paid to military retirees by the Federal Government; (2) enjoin the defendant, Kansas Department of Revenue, from making any other distinctions which result in such inconsistent treatment of retirement benefits which are in violation of 4 U.S.C. Section 111; (3) require defendant, Kansas Department of Revenue, to compute and refund the amount of all taxes paid pursuant to said State policy on military retirement benefits. Plaintiffs further pray that the Court grant their costs, reasonable attorney fees, and such other additional or alternative relief as to the Court appears equitable and just under the circumstances.

* * * * * * *

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION 4

FIRST AMENDED PETITION
[Case No. 89-CV-666]

Filed April 18, 1989
[Caption Omitted in Printing]

Plaintiffs Keyton Barker and William Richards, Sr., for themselves and all others similarly situated, hereby allege and state as follows:

1. Plaintiff Keyton Barker ("Barker") is a citizen and domiciliary of Shawnee County, Kansas. Mr. Barker is a retired Noncommissioned Officer (NCO) of the United States who served 22 creditable years in the United States Army and attained the rank/grade of Sergeant First Class (SFC)/E-7 before retiring from the active military service in February 1968. Pursuant to applicable provisions of Title 10 of the United States Code, Plaintiff Barker has been and will continue to be a recipient of federal armed forces retirement benefits based upon his rank and years of service.

2. Plaintiff William Richards, Sr. ("Richards") is a citizen and domiciliary of Shawnee County, Kansas. Mr. Richards is a retired Commissioned Officer of the United States who served more than 27 creditable years in the United States Army and attained the rank/grade of Lieutenant Colonel (LTC)/O-5 before retiring from the active military service on July 1, 1970. Pursuant to applicable provisions of Title 10 of the United States Code, Plaintiff Richards has been and will continue to be a recipient of federal armed forces retirement benefits based upon his rank and years of service.

3. Plaintiff class sought to be certified herein consists of all retired members of the federal armed forces residing in the State of Kansas who are past, present and/or future recipients of federal retirement benefits (under applicable provisions of Title 10 of the United States Code) which have been and remain subject to state income taxation. Upon information and belief, Plaintiffs Barker and Richards allege that there are more than 10,000 members of this class.

4. Defendant State of Kansas ("State") is a duly recognized and admitted state of the Union of the United States of America and may be served with process by serving Robert T. Stephan, Attorney General of the State of Kansas, Kansas Judicial Center, 301 W. 10th Street, Topeka, Kansas 66612.

5. Defendant Kansas Department of Revenue ("Department of Revenue") is an agency and instrumentality of the State of Kansas created and existing under the authority of K.S.A. 75-5101 *et seq.* and any amendments thereto, and may be served with process by serving Ed Rolfs, Secretary of Revenue of the State of Kansas, Docking State Office Building, 915 S.W. Harrison Street, Topeka, Kansas 66612.

FACTUAL BACKGROUND

6. Pursuant to pertinent provisions of the Kansas Income Tax Act (K.S.A. 79-3201, *et seq.* and amendments thereto), Plaintiffs have been required to pay and have paid state income taxes on their federal retirement benefits during each year from 1984 through the present.

7. At all times relevant since 1984, the Department of Revenue has collected, received and disposed of such income tax payments under the color of state law for and on behalf of the State of Kansas.

8. Pursuant to the provisions of K.S.A. 79-32,117(c)(11) and K.S.A. 74-4923(b), together with amendments

thereto, all retirement benefits paid by the State under the Kansas public employees retirement system (K.S.A. 74-4901 *et seq.* and amendments thereto) and the Kansas Police and Firemen's Retirement System (K.S.A. 74-4951 *et seq.* and amendments thereto) have been specifically exempt from state income taxation during each year from at least 1984 through the present. In addition, amounts received as annuities under the federal civil service retirement system; amounts received by retired railroad employees as supplemental annuity benefits; and amounts received by retired employees of a city and by retired employees of any board of such city in accordance with K.S.A. 13-14,106 or exemptions therefrom, have been likewise exempt from state income taxation, under the provisions of K.S.A. 79-32,117(c) and amendments thereto, during each year from at least 1984 through the present.

9. The retirement, pension and/or annuity benefits referenced in paragraph 8 above will remain exempt from state income taxation for the indefinite future absent a change in state law. Likewise, the federal retirement benefits received by Plaintiffs will remain subject to state income taxation for the indefinite future absent a change in state law or judicial decree.

10. Such inconsistent treatment of retirement benefits for state income tax purposes constitutes discriminatory taxation which is neither directly related to nor justified by significant differences between the classes of retirees. Consequently, state income taxation of Plaintiffs' federal retirement benefits violates 4 U.S.C. § 111 and constitutional principles of intergovernmental tax immunity as discussed and applied in *Davis v. Michigan Department of Treasury*, No. 87-1020, 57 U.S.L.W. 4389 (U.S. Sup.Ct., Mar. 28, 1989).

11. Pursuant to K.S.A. 60-223, Plaintiffs Barker and Richards seek to represent the class of all persons similarly situated which is identified and defined in Paragraph 3 above. Plaintiffs Barker and Richards are members of the proposed class; their claims are typical of the claims of all class members; and

they will fairly and adequately represent and protect the interests of all class members.

12. Since Plaintiffs are informed and believe that the proposed class will consist of more than 10,000 retired members of the federal and armed forces residing in Kansas, joinder of all such class members is impracticable. Moreover, questions of law and fact common to members of the class predominate over any questions affecting individual members, and a class action is superior to all other available methods for securing a fair and efficient adjudication of this controversy.

COUNT I - DEPRIVATION OF FEDERAL CIVIL RIGHTS

13. The allegations articulated in Paragraph 1 through 12 above are hereby incorporated by reference as though fully set forth herein.

14. Defendant Department of Revenue, by and through its Secretary, Director of Taxation, officers, agents and employees acting under the color of state law, has subjected Plaintiffs or caused Plaintiffs to be subjected to the deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States in violation of 42 U.S.C. § 1983.

15. As a result of such deprivation of federally-protected civil rights, Plaintiffs and the class they seek to represent have suffered substantial monetary damages and will continue to suffer such damages on a quarterly and/or annual basis absent permanent injunctive relief which prohibits the Department of Revenue (including its Secretary, Director of Taxation, agents and employees) from taking any direct or indirect action to subject Plaintiffs' federal retirement benefits to state income taxation.

COUNT II - DEPRIVATION OF STATE CONSTITUTIONAL RIGHTS

16. The allegations articulated in Paragraphs 1 through

15 above are hereby incorporated by reference as though fully set forth herein.

17. The Constitution of the State of Kansas, Article 11, Section 2 implicitly prohibits Defendants from levying and collecting taxes on income based upon arbitrary, capricious and discriminatory classifications.

18. Under the circumstances described herein, Plaintiffs allege that state income taxation of their federal retirement benefits, including the levying and collection of such taxes, subjects them to unequal treatment and is impermissibly based upon arbitrary, capricious and discriminatory classifications in violation of KAN. CONST., art. 11 § 2.

COUNT III - DECLARATORY JUDGMENT

19. The allegations articulated in Paragraphs 1 through 18 above are hereby incorporated by reference as though fully set forth herein.

20. An actual case and controversy exists between the parties under the provisions of K.S.A. 60-1701 *et seq.* regarding the arbitrary and discriminatory taxation of Plaintiffs' federal retirement benefits under the Kansas Income Tax Act. Absent judicial declaration that the state income tax act is unconstitutional as applied and that federal armed forces retirees are exempt from paying state income tax on their federal retirement benefits, Plaintiffs and the class they seek to represent will be severely and adversely affected, and will be caused to suffer severe financial damages in the future.

COUNT IV - ACCOUNTING AND REFUND OF STATE INCOME TAXES ON FEDERAL RETIREMENT BENEFITS

21. The allegations articulated in Paragraphs 1 through 20 above are hereby incorporated by reference as though fully set

forth herein.

22. Defendant State has subjected Plaintiffs and the class they seek to represent to arbitrary and discriminatory income taxation of federal retirement benefits since at least 1984. At all times pertinent hereto, Defendant Department of Revenue has collected and received income tax revenues from said federal retirement benefits; and Plaintiffs, including the class they seek to represent, have paid such arbitrary and discriminatory state income taxes on such federal retirement benefits.

23. Under the circumstances presented, Plaintiffs and the class they seek to represent are entitled to an accounting of all such discriminatory income taxes collected from 1984 through the present and to a refund, together with appropriate interest at the rate of 12% per year from the date(s) of overpayment, of all such monies.

24. While Plaintiffs acknowledge the existence of certain administrative remedies to obtain state income tax refunds, such mechanisms are plainly inadequate and recourse to such procedures would be futile under the circumstances.

25. Plaintiffs and the class they seek to represent are entitled to state income tax refunds, together with interest, in substantial amount which probably exceeds $1,000,000.00 per year for each tax year from 1984 through the present.

PRAYER FOR RELIEF

WHEREFORE, premises considered, Plaintiffs pray for the following relief:

A. That the Court determine, as soon as practicable, that this case is a proper class action; that Plaintiffs Barker and Richards are proper class representatives; and that no notice of this action need be given to members of the class represented by these named plaintiffs, all in accordance with K.S.A. 60-223;

B. That the Court issue its judicial declaration that the Kansas Income Tax Act is unconstitutional as applied to Plaintiffs' federal retirement benefits; that Defendants, under the color of state law, have wrongfully subjected Plaintiffs or caused Plaintiffs to be subjected to arbitrary and discriminatory income taxation in violation of the Constitution and laws of the United States from at least 1984 through the present; and that Plaintiffs' federal retirement benefits have been and continue to be exempt from state income taxation under the circumstances; that Plaintiffs are not required to pay state income taxes on their federal retirement benefits in the future; and that Plaintiffs are entitled to a refund of all discriminatory state income tax revenues paid and/or collected since 1984 in connection with their federal retirement benefits, together with appropriate interest at the rate of 12% per year until paid in full;

C. That the Court enter a permanent injunction prohibiting the State of Kansas, the Department of Revenue, and all officers, agents and employees thereof from levying, assessing and/or collecting state income taxes on Plaintiffs' federal armed forces retirement benefits;

D. That the Court order the Department of Revenue to account to Plaintiffs and the class they seek to represent for all state income tax revenues collected or received since 1984 because of the taxation of Plaintiffs' federal retirement benefits;

E. That the Court enter judgment for Plaintiffs and the class they seek to represent, and against Defendants State of Kansas and Department of Revenue, for state income tax refunds to which Plaintiffs and Plaintiff class are entitled for each tax year from 1984 through the present, together with interest, in a total amount exceeding $10,000.00; and

F. That the Court award Plaintiffs their costs, including reasonable attorney fees under 42 U.S.C. § 1988, and such other and further relief as may be deemed just and equitable under the circumstances.

* * * * * * * *

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
Division 4

ANSWER
[Case No. 89-CV-666]

Filed May 18, 1989
[Caption Omitted in Printing]

COMES NOW the defendants, State of Kansas and Kansas Department of Revenue, and for their answer to plaintiffs' first amended petition state and allege as follows:

1. All statements and allegations contained in plaintiffs' first amended petition not specifically admitted herein are denied.

2. Defendants are without knowledge sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 2 and 3 and therefore deny the same.

3. Paragraph 4 is admitted.

4. Defendants admit that portion of paragraph 5 stating that the Kansas Department of Revenue is an agency and instrumentality of the state of Kansas but deny that the Department of Revenue may be served with process by serving Ed Rolfs, Secretary of Revenue.

5. Defendants are without knowledge sufficient to form a belief as to the truth of the allegations contained in paragraphs 6 and 7 and therefore deny the same.

6. With respect to the allegations contained in

paragraph 8 defendants state that the statutes mentioned therein speak for themselves.

7. With respect to the allegations contained in paragraph 9 defendants admit that state statutes will continue in effect until they are lawfully changed. Defendants are without knowledge sufficient to form a belief as to the truth of the allegations concerning the federal retirement benefits allegedly received by plaintiffs and therefore deny the same.

8. Defendants deny the allegations contained in paragraph 10 and further deny that the Kansas income tax act violates the Constitution and laws of the United States and judicial doctrines of intergovernmental immunity.

9. Defendants are without knowledge sufficient to form a belief as to the truth of the allegations contained in paragraphs 11 and 12 and therefore deny the same.

10. Defendants deny the allegations contained in paragraph 14 and further deny that they have in any way deprived plaintiffs and the member of their purported class of rights, privileges and immunities secured to them under the Constitution and laws of the United States or have engaged in any conduct that would constitute a violation of 42 U.S.C. § 1983.

11. Defendants deny the allegations contained in paragraph 15 and further deny that they have in any way violated plaintiffs' civil rights. The extent, if any, of plaintiffs' alleged injuries or damages is unknown to defendants and the same are therefore denied. Defendants further deny that they should be restrained or enjoined, permanently or otherwise, from taking any action with respect to plaintiffs and the members of their purported class.

12. With respect to the allegations contained in paragraph 17 defendants state that the section of the Constitution of the state of Kansas mentioned therein speaks for itself.

13. Defendants deny the allegations contained in paragraph 18 and further deny that their treatment of plaintiffs in any way violates the Constitution of the state of Kansas.

14. Defendants deny the allegations contained in paragraph 20 and further deny they have subjected plaintiffs to arbitrary and discriminatory taxation and that the Kansas income tax act or any portion thereof is unconstitutional or otherwise invalid.

15. Defendants deny the allegations contained in paragraph 22 and further deny that they have subjected plaintiffs and the members of their purported class to arbitrary and discriminatory taxation. Defendants are without knowledge sufficient to form a belief as to the truth of the allegations that plaintiffs and the member of their purported class paid Kansas income tax during the years in question and reported federal retirement benefits as Kansas taxable income and therefore deny the same.

16. Defendants deny the allegations contained in paragraph 23 and further deny that Kansas income taxes have been unlawfully collected from plaintiffs and the members of their purported class.

17. Defendants deny the allegations contained in paragraph 24 and further deny that the existing administrative remedies available to plaintiffs are inadequate and that recourse thereto would be futile. Defendants affirmatively state and allege that plaintiffs must pursue and exhaust the administrative remedies provided by law before they may seek or obtain judicial relief.

18. Defendants deny the allegations contained in paragraph 25 and further deny that plaintiffs and the members of their purported class are entitled to refunds of Kansas income taxes paid in any of the years in question.

WHEREFORE, having fully answered plaintiffs' first

amended petition defendants pray that plaintiffs take naught thereby, that judgment be entered for defendants, that plaintiffs' petition be dismissed with prejudice and that all costs accruing herein be assessed against plaintiffs.

Defendants further pray that no class be certified for purposes of class action litigation, that no declaratory judgment be entered determining that the Kansas income tax act is unconstitutional or in any way violative of state or federal law, that no injunction be issued enjoining defendants from engaging in any conduct whatsoever and that the court grant defendants such other and further relief as it deems just and appropriate.

* * * * * * * *

IN THE DISTRICT COURT OF
LEAVENWORTH COUNTY, KANSAS

ANSWER
[Case No. 89-CV-1100]

Filed May 19, 1989
[Caption Omitted in Printing]

COMES NOW the defendants, State of Kansas and Kansas Department of Revenue, and for their answer to plaintiff's petition state and allege as follows:

1. All statements and allegations contained in plaintiffs' petition not specifically admitted herein are denied.

2. Defendants deny the allegations contained in paragraph 1 and deny that they should be restrained or enjoined, permanently or otherwise, from taking any action with respect to plaintiffs and the members of their purported class. Defendants further deny that they should be required to refund any taxes previously paid by plaintiffs and the members of their purported class.

3. Defendants are without knowledge sufficient to form a belief as to the truth of the allegations contained in paragraphs 2 and 3 and therefore deny the same.

4. Paragraph 4 is admitted.

5. Defendants admit that part of paragraph 5 stating that retirement benefits paid by the state of Kansas are exempt from Kansas income tax. The remainder of paragraph 5 is denied.

6. Defendants deny the allegations contained in paragraph 6 and further deny that they have in any way violated plaintiffs' constitutional right to equal protection of law.

7. Defendants deny the allegations contained in paragraph 7 and further deny that they have in any way violated 4 U.S.C. § 111.

8. Defendants deny the allegations contained in paragraph 8 and further deny that their conduct in any way violates or is barred by the doctrine of intergovernmental tax immunity or is otherwise not justified, unlawful or invalid.

9. Defendants deny the allegations contained paragraph 9 and deny that their actions have caused plaintiffs to be deprived of income to which they are lawfully entitled. Defendants further deny that they have deprived plaintiffs of equal protection of law and that any such alleged denial has caused irreparable harm or injury. Defendants further deny that plaintiffs have no adequate or complete remedy to redress their alleged injuries other than a suit for injunctive relief. Defendants affirmatively state and allege that plaintiffs must pursue and exhaust the administrative remedies provided by law before they may seek or obtain judicial relief.

WHEREFORE, having fully answered plaintiffs' petition defendants pray that plaintiffs take naught thereby, that judgment be entered for defendants, that plaintiffs' petition be dismissed with

prejudice and that all costs accruing herein be assessed against plaintiffs.

Defendants further pray that no injunction be issued enjoining defendants from engaging in any conduct whatsoever, that no order be entered directing defendants to refund any taxes and that the court grant defendants such other and further relief as it deems just and equitable.

* * * * * * *

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION 4

MOTION OF APPLICANT ANTHONY E. CORCORAN TO INTERVENE
[Case No. 89-CV-666]

Filed August 1, 1989
[Caption Omitted in Printing]

COMES NOW the applicant, Anthony E. Corcoran, and pursuant to K.S.A. §60-224(b), hereby moves the Court for its Order allowing intervention. As grounds for this motion, Anthony E. Corcoran states as follows:

1. K.S.A. §60-224(b) provides in pertinent part:

> Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

2. Applicant Anthony E. Corcoran is a resident of the State of Kansas. His address is 1522 South Oak, Ottawa, Kansas 66607.

3. Applicant Corcoran is a retired federal military naval commander who now receives pension payments which are allegedly subject to Kansas State taxation in violation of federal and state law.

4. Applicant Corcoran may be a putative class member in the above captioned cause and as such may be a plaintiff whose interest is directly affected by the litigation. However, as of this date, no class has been certified in this case.

5. Pursuant to K.S.A. §60-224(c), applicant Corcoran herewith files his pleading setting forth the claim for which intervention is sought. As fully set out in the pleading, applicant Corcoran is representative of a class more broadly defined than the putative class currently before the Court. Applicant Corcoran also names Ed Rolfs, Secretary of Revenue, and John Luttjohann, Director of Taxation, as individual defendants in their official capacity, pursuant to K.S.A. §60-219 and §60-220 which govern joinder. Further, applicant Corcoran, as a class representative, will exhaust his administrative remedies on behalf of the class if the Court so orders.

6. Applicant Corcoran further requests that the Court consider his Memorandum in Support of Plaintiffs' Response to Defendants' Motion to Dismiss, filed concurrently herewith. This memorandum includes additional evidence germane to the "exhaustion of administrative remedies" argument presently pending before the Court. In the alternative, this Memorandum sets forth applicant Corcoran's willingness to exhaust administrative remedies on behalf of the class upon class certification by the Court and the Court's Order directing immediate recognition by the Department of Revenue, pursuant to K.S.A. §60-223.

All of the above is more fully set forth in the Memorandum in Support of Applicant's Motion to Intervene, Petition of Intervenor, pursuant to K.S.A. §60-224(c), and Intervenor's Memorandum in Support of Plaintiffs' Response to Defendants' Motion to Dismiss filed concurrently herewith.

WHEREFORE, applicant Corcoran respectfully requests that the Court enter its Order as follows:

a. Allowing applicant Corcoran to intervene in this action as class representative of the class defined as follows:

> All retired members of the federal armed forces or said members' survivors and beneficiaries who are past, present and/or future recipients of federal retirement benefits which have been and/or remain subject to state income taxation from the year 1984 through the present time.

b. Denying defendants' pending Motion to Dismiss or, in the alternative, certifying the class described above and allowing applicant Corcoran to proceed as class representative in collectively exhausting administrative remedies, under the Court's supervision.

* * * * * * * *

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION 4

PETITION OF INTERVENOR ANTHONY E. CORCORAN
[Case No. 89-CV-666]

Filed August 1, 1989
[Caption Omitted in Printing]

Intervenor Anthony E. Corcoran, for himself and all others similarly situated, hereby alleges and states as follows:

PARTIES

1. Intervenor Anthony E. Corcoran is a citizen and domiciliary of Ottawa, Kansas. Mr. Corcoran is a retired Commander of the United States Navy who served twenty creditable years in the United States Navy before retiring from the active military service in 1985. Pursuant to applicable provisions of Title 10 of the United States Code, Intervenor Corcoran has been and will continue to be a recipient of federal armed forces retirement benefits based upon his rank and years of service.

2. As more fully set out below at paragraphs 8 through 13, Intervenor/Plaintiff class sought to be certified herein consists of the following members:

> All retired members of the federal armed forces or said members' survivors and beneficiaries who are past, present and/or future recipients of federal retirement benefits (under applicable provisions of Title 10 of the United States Code) which have been and/or remain subject to state income taxation in the State of Kansas for the tax year 1984 through the present time.

3. While Intervenor/Plaintiffs acknowledge the existence of certain administrative remedies to obtain state income tax refunds, such mechanisms are plainly inadequate and recourse to such procedures would be futile under the circumstances. In the alternative, Intervenor Corcoran is willing to exhaust administrative remedies on behalf of the class under the Court's Supervision.

4. Defendant State of Kansas ("State") is a duly recognized and admitted state of the Union of the United States of America and has been served with process by the plaintiffs.

5. Defendant Kansas Department of Revenue ("Department of Revenue") is an agency and instrumentality of the State of Kansas created and existing under the authority of K.S.A. 75-5101 *et seq.* and any amendments thereto, and has been served with process by the plaintiffs.

6. Defendant Ed Rolfs is Secretary of Revenue of the State of Kansas and may be served with process at the Department of Revenue, Docking State Office Building, 915 S.W. Harrison Street, Topeka, Kansas 66612.

7. Defendant John Luttjohann is Director of Taxation for the State of Kansas and may be served with process at the Department of Revenue, Docking State Office Building, 915 S.W. Harrison Street, Topeka, Kansas 66612.

CLASS ALLEGATIONS

8. Intervenor/Plaintiffs bring this action on behalf of themselves and, pursuant to K.S.A. 60-223, on behalf of all other retired members of the federal armed services or their survivors and beneficiaries as described in paragraph 2 above.

9. Members of the Class are so numerous and geographically dispersed that joinder of all class members is impracticable. As reported in the *Topeka Capital Journal*, June 20, 1989, page 1-A, Mark Burghart, Chief Counsel for the Department of Revenue, told the Kansas legislature Interim Committee on Assessment and Taxation that there are about 14,000 military retirees in Kansas paying about $7.5 million a year in state income taxes.

10. Intervenor/Plaintiffs will fairly and adequately protect the interests of the members of the class and have retained

counsel competent and experienced in class and tax litigation.

11. Intervenor/Plaintiffs' claims are typical of the claims of the members of the class as intervenor and all members of the class were wrongfully subjected to state income taxation by defendants as fully set out below.

12. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual class members may be relatively small, the expense and burden of individual litigation make it impossible for the class members to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

13. There are questions of law and fact common to this class which predominate over any questions solely affecting individual members of the class. Among the questions of law and fact common to this case are:

(a) Is the State of Kansas wrongfully taxing the retirement benefits of federal military retirees or their survivors and beneficiaries.

(b) Are Intervenor/Plaintiffs recipients of benefits provided by 10 U.S.C., *et seq.*

FACTUAL BACKGROUND

14. Intervenor/Plaintiffs incorporate by reference, as though fully set forth herein, the allegations of plaintiffs Keyton Barker and William Richards, et al., contained in the Factual Background of the *Barker and Richards* Amended Petition.

COUNT I - DEPRIVATION OF FEDERAL CIVIL RIGHTS AGAINST ALL DEFENDANTS

15. Intervenor/Plaintiffs incorporate by reference, as though fully set forth herein, the allegations contained in Count I of the *Barker and Richards* Amended Petition.

COUNT II - DEPRIVATION OF STATE CONSTITUTIONAL RIGHTS AGAINST ALL DEFENDANTS

16. Intervenor/Plaintiffs incorporate by reference, as though fully set forth herein, the allegations contained in Count II of the *Barker and Richards* Amended Petition.

COUNT III - DECLARATORY JUDGMENT AGAINST ALL DEFENDANTS

17. Intervenor/Plaintiffs incorporate by reference, as though fully set forth herein, the allegations contained in Count III of the *Barker and Richards* Amended Petition.

COUNT IV - ACCOUNTING AND REFUND OF STATE INCOME TAXES ON FEDERAL RETIREMENT BENEFITS AGAINST ALL DEFENDANTS

18. Intervenor/Plaintiffs incorporate by reference, as though fully set forth herein, the allegations contained in Count IV of the *Barker and Richards* Amended Petition.

PRAYER FOR RELIEF

WHEREFORE, premises considered, Intervenor/plaintiffs pray for the following relief:

A. That the Court determine, as soon as practicable, that this case is a proper class action and that Intervenor Corcoran is a proper class representative.

B. That the Court issue its judicial declaration that the Kansas Income Tax Act is unconstitutional as applied to

intervenor/plaintiffs' federal retirement benefits; that defendants, under the color of state law, have wrongfully subjected intervenor/plaintiffs or caused intervenor/plaintiffs to be subjected to arbitrary and discriminatory income taxation in violation of the Constitution and laws of the United States from at least 1984 through the present; that intervenor/plaintiffs' federal retirement benefits have been and continue to be exempt from state income taxation under the circumstances; that intervenor/plaintiffs are not required to pay state income taxes on their federal retirement benefits in the future; and that intervenor/plaintiffs are entitled to a refund of all discriminatory state income tax revenues paid and/or collected since 1984 in connection with their federal retirement benefits, together with appropriate interest at the rate of 12% per year until paid in full;

C. That the Court enter a permanent injunction prohibiting the State of Kansas, the Department of Revenue, and all officers, agents and employees thereof from levying, assessing and/or collecting state income taxes on intervenor/plaintiffs' federal armed forces retirement benefits;

D. That the Court order the Department of Revenue to account to intervenor/plaintiffs and the class they seek to represent for all state income tax revenues collected or received since 1984 because of the taxation of intervenor/plaintiffs' federal retirement benefits;

E. That the Court enter judgment for intervenor/plaintiffs and the class they seek to represent, and against defendants for state income tax refunds to which intervenor/plaintiffs and their class are entitled for each tax year from 1984 through the present, together with interest, in a total amount exceeding $10,000.00; and

F. That the Court award intervenor and his class their costs, including reasonable attorney fees under 42 U.S.C. §1988, and as permitted in common law, and such other and further relief as may be deemed just and equitable under the circumstances.

* * * * * * * *

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION 4

WILLIAM H.LOBER and MARJORIE E. LOBER, husband and wife, EDWARD F. KELLOGG and RENATE O. KELLOGG, husband and wife, ROGER J. OLSON and NANCY W. OLSON, husband and wife, ROGER W. CLAY and BETTY J. CLAY, husband and wife, and LELAND W. KEISTER and PATRICIA K. KEISTER, husband and wife, and others similarly situated
Plaintiffs,

vs.

STATE OF KANSAS, DEPARTMENT OF REVENUE
Defendants
[Case No. 89-CV-1100]

JOURNAL ENTRY

Filed August 29, 1989

NOW ON THIS 29th day of August, 1989, comes on for hearing the Motion by plaintiffs William J. Lober, Jr., et al, to consolidate case number 89 CV 1100 with case number 89 CV 666, *Barker, et al v. State of Kansas*. The plaintiffs appear by and through counsel Terence A. Lober, of counsel with DAVIS, BEALL, McGUIRE & THOMPSON, Chartered. Plaintiffs counsel in *Barker, et al v. State of Kansas*, 89 CV 666, appear by and through Kevin Fowler of FRIEDEN & FORBES, Chartered. The State of Kansas appears by and through James F. Bartle, Special Assistant Attorney General, Kansas Department of Revenue. There are no other appearances.

WHEREUPON after having heard the statements and arguments of counsel, having heard the arguments and objections of all parties, having reviewed the files in case number 89 CV 1100 and case number 89 CV 666, and being otherwise well and duly advised in the premises, the Court finds that the Motion to Consolidate should be, and hereby is granted.

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED that case number 89 CV 1100 and case number 89 CV 666 be, and they hereby are, consolidated for purposes of trial and pending further order of this Court.

IT IS SO ORDERED.

Thomas R. Conklin
District Court Judge

* * * * * * * *

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION 4

KEYTON BARKER and WILLIAM RICHARDS, SR.,
for themselves and all others similarly situated
Plaintiffs,

v.

STATE OF KANSAS and KANSAS
DEPARTMENT OF REVENUE
Defendants.
[Case No. 89-CV-666]

WILLIAM H. LOBER and MARJORIE E. LOBER, husband and wife, EDWARD F. KELLOGG and RENATE O. KELLOGG, husband and wife, ROGER J. OLSON and

NANCY W. OLSON, husband and wife, ROGER W. CLAY and BETTY J. CLAY, husband and wife, and LELAND W. KEISTER and PATRICIA K. KEISTER, husband and wife, and others similarly situated
Plaintiffs,

vs.

STATE OF KANSAS, DEPARTMENT OF REVENUE
Defendants
[Case No. 89-CV-1100]

JOURNAL ENTRY

Filed on September 21, 1989

NOW on this 20th day of September, 1989, Case No. 89-CV-666 is before the Court on Plaintiffs' Motion for Leave to File a Second Amended Petition (filed and served August 10, 1989). Pursuant to the provisions of K.S.A. 60-215, K.S.A. 60-220(a) and K.S.A. 60-221, Plaintiffs seek leave to file a second amended petition which, *inter alia*, joins three additional defendants in their respective official capacities. Defendants State of Kansas and Kansas Department of Revenue do not oppose said motion.

WHEREUPON, after reviewing the pleadings and being otherwise well and fully advised in the premises, for good cause shown, the Court finds and concludes that Plaintiffs' motion should be and is hereby granted, and that the Second Amended Petition annexed to said motion should be filed forthwith.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs in Case No. 89-CV-666 are granted leave to immediately file their Second Amended Petition; that the Second Amended Petition annexed to the motion referenced above shall be deemed filed as of the date of this Journal Entry; and that Mike Hayden, Governor of the State of Kansas; Ed Rolfs,

Secretary of Revenue of the State of Kansas; and John Luttjohann, Director of Taxation of the State of Kansas, are hereby joined in Case No. 89-CV-666 as additional parties defendant, each in his respective official capacity, and the names of such official capacity defendants shall be added to the caption of Case No. 89-CV-666 for all purposes from the date of this Journal Entry.

Adrian Allen
District Court Judge

* * * * * * * *

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION 4

INTERVENTION ORDER

Filed September 21, 1989
[Caption Omitted in Printing]

NOW on this 20th day of September, 1989, the above-styled consolidated action is before the Court on the Motion of Applicant Anthony E. Corcoran to Intervene in Case No. 89-CV-666. Plaintiffs in both actions have consented to the intervention of Anthony E. Corcoran as a putative member of the plaintiff class, and Defendants have not opposed such intervention. Accordingly, this intervention motion is ripe for decision.

WHEREUPON, after reviewing the pleadings, being well and duly advised in the premises, and for good cause shown, the Court finds and concludes that Anthony E. Corcoran should be and is hereby permitted to intervene in Case No. 89-CV-666 for all purposes and further proceedings herein.

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED that Anthony E. Corcoran shall be

henceforth considered as an intervenor/plaintiff; that the Petition of Intervenor Anthony E. Corcoran shall be joined with the issues raised in Case No. 89-CV-666; and that the name of Anthony E. Corcoran shall be added as an intervenor in Case No. 89-CV-666 for all purposes from this date forward.

Adrian J. Allen
District Court Judge

* * * * * * *

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION 4

SECOND AMENDED PETITION
[Case No. 89-CV-666]

Filed September 22, 1989
[Caption Omitted in Printing]

Plaintiffs, for themselves and all others similarly situated, hereby allege and state as follows:

PARTIES PLAINTIFF

1. Plaintiff Keyton Barker is a citizen and domiciliary of Shawnee County, Kansas. Mr. Barker is a retired Noncommissioned Officer (NCO) of the United States who served 22 creditable years in the United States Army and attained the rank/grade of Sergeant First Class (SFC)/E-7 before retiring from the active military service in February 1968. Pursuant to applicable provisions of Title 10 of the United States Code, Plaintiff Barker has been and will continue to be a recipient of federal armed forces retirement benefits based upon his rank and years of service.

2. Plaintiff Pauline Barker is a citizen and domiciliary of Shawnee County, Kansas. She is and has been the lawful wife of Plaintiff Keyton Barker from at least tax year 1984 through the present, and Ms. Barker resides with her husband in Shawnee County, Kansas.

3. Plaintiff William Richards, Sr. is a citizen and domiciliary of Shawnee County, Kansas. Mr. Richards is a retired Commissioned Officer of the United States who served more than 27 creditable years in the United States Army and attained the rank/grade of Lieutenant Colonel (LTC)/O-5 before retiring from the active military service on July 1, 1970. Pursuant to applicable provisions of Title 10 of the United States Code, Plaintiff Richards has been and will continue to be a recipient of federal armed forces retirement benefits based upon his rank and years of service.

4. Plaintiff Ollun E. Richards is a citizen and domiciliary of Shawnee County, Kansas. She is and has been the lawful wife of Plaintiff William Richards, Sr. from at least tax year 1984 through the present, and Ms. Richards resides with her husband in Shawnee County, Kansas.

5. Plaintiff Andrew J. Peele is a citizen and domiciliary of Saline County, Kansas, and has been a single man from at least tax year 1984 through the present. Mr. Peele is a retired Noncommissioned Officer (NCO) of the United States who served more than 20 creditable years in the United States Air Force and attained the rank/grade of Master Sergeant (MSG)/E-7 before retiring from the active military service in May 1973. Pursuant to applicable provisions of Title 10 of the United States Code, Mr. Peele has been and will continue to be a recipient of federal armed forces retirement benefits based upon his rank and years of service.

6. Plaintiff Clarence Wolf is a citizen and domiciliary of Osage County, Kansas. Mr. Wolf is a retired Noncommissioned Officer (NCO) of the United States who served more than 20

creditable years in the United States Air Force and attained the rank/grade of Technical Sergeant (TSG)/E-6 before retiring from the active military service in October 1973. Pursuant to applicable provisions of Title 10 of the United States Code, Mr. Wolf has been and will continue to be a recipient of federal armed forces retirement benefits based upon his rank and years of service.

7. Plaintiff Flora B. Wolf is a citizen and domiciliary of Osage County, Kansas. She is and has been the lawful wife of Plaintiff Clarence Wolf from at least tax year 1984 through the present, and Ms. Wolf resides with her husband in Osage County, Kansas.

8. Plaintiff John G. Fowler is a citizen and domiciliary of Shawnee County, Kansas. Mr. Fowler is a retired Commissioned Officer of the United States who served more than 30 creditable years in the United States Army and attained the rank/grade of Colonel (COL)/O-6 before retiring from the active miliary service in May 1983. Pursuant to applicable provisions of Title 10 of the United States Code, Mr. Fowler has been and will continue to be a recipient of federal armed forces retirement benefits based upon his rank and years of service.

9. Plaintiff Carol B. Fowler is a citizen and domiciliary of Shawnee County, Kansas. She is and has been the lawful wife of Plaintiff John G. Fowler from at least tax year 1984 through the present, and Ms. Fowler resides with her husband in Shawnee County, Kansas.

10. Plaintiff Leonard W. Williams is a citizen and domiciliary of Saline County, Kansas. Mr. Williams is a retired Noncommissioned Officer (NCO) of the United States who served more than 22 creditable years in the United States Navy and attained the rank/grade of Senior Chief Petty Officer (E-8) before retiring from the active military service in October 1983. Pursuant to applicable provisions of Title 10 of the United States Code, Mr. Williams has been and will continue to be a recipient of federal armed forces retirement benefits based upon his rank and years of

service.

11. Plaintiff Loneta S. Williams is a citizen and domiciliary of Saline County, Kansas. She is and has been the lawful wife of Plaintiff Leonard W. Williams from at least tax year 1984 through the present, and Ms. Williams resides with her husband in Saline County, Kansas.

12. Plaintiff class sought to be certified herein consists of all retired members of the federal armed forces who are past, present and/or future recipients of federal retirement benefits (under applicable provisions of Title 10 of the United States Code) which have been and remain subject to state income taxation pursuant to the Kansas Income Tax Act and, where applicable, their spouses who have filed and/or will file joint state income tax returns in the State of Kansas. Upon information and belief, Plaintiffs allege that there are more than 10,000 members of this class.

PARTIES DEFENDANT

13. Defendant State of Kansas ("State") is a duly recognized and admitted state of the Union of the United States of America and may be served with process by serving its counsel of record herein, Mark Burghart and James Bartle, Docking State Office Building, Legal Services, 915 S.W. Harrison Street, Topeka, Kansas 66612-1588.

14. Defendant Kansas Department of Revenue ("Department of Revenue" or "Department") is an agency and instrumentality of the State of Kansas created and existing under the authority of K.S.A. 75-5101 *et seq.* and any amendments thereto, and may be served with process by serving its counsel of record herein, Mark Burghart and James Bartle, Docking State Office Building, 915 S.W. Harrison Street, Topeka, Kansas 66612-1588.

15. Defendant Mike Hayden is the duly elected and

acting Governor of the State of Kansas, who is responsible for the enforcement of the laws of the State under the provisions of Article 1, Section 3 of the Constitution of the State of Kansas, and may be served with process at the Office of the Governor, State Capitol Building, Topeka, Kansas 66612.

16. Defendant Ed Rolfs is the duly appointed and acting Secretary of Revenue of the State of Kansas, who is the head of and responsible for directing and supervising the administration of the Kansas Department of Revenue pursuant to K.S.A. 75-5101, and may be served with process at the Office of the Secretary of Revenue, Kansas Department of Revenue, Docking State Office Building, 915 S.W. Harrison, Topeka, Kansas 66612.

17. Defendant John Luttjohann is the duly appointed and acting Director of Taxation of the State of Kansas and may be served with process at the office of the Director of Taxation, Kansas Department of Revenue, Docking State Office Building, 915 S.W. Harrison, Topeka, Kansas 66612. The Director of Taxation, as the head of the Department's Division of Taxation pursuant to K.S.A. 75-5102, is responsible for administration of the Kansas Income Tax Act under K.S.A. 79-3233.

FACTUAL BACKGROUND

18. Pursuant to pertinent provisions of the Kansas Income Tax Act (K.S.A. 79-3201 *et seq.* and amendments thereto), Plaintiffs Keyton Barker, William Richards, Sr., Andrew J. Peele, Clarence Wolf, John G. Fowler and Leonard Williams have been required to pay and have paid Kansas state income taxes on their federal retirement benefits during each year from 1984 through the present. During this same period, Plaintiffs Pauline Barker, Ollun E. Richards, Flora B. Wolf, Carol B. Fowler and Loneta S. Williams, having an undivided interest in the federal retirement benefits received by and as joint taxpayers with their respective spouses, have likewise paid Kansas state income taxes

on said federal retirement benefits.

19. At all times relevant since 1984, acting under the supervision of the Governor and the Secretary of Revenue, the Director of Taxation has collected, received and disposed of such income tax payments under the color of state law for and on behalf of the State of Kansas and the Kansas Department of Revenue.

20. Pursuant to the provisions of K.S.A. 79-32,117(c)(11) and K.S.A. 74-4923(b), together with amendments thereto, all retirement benefits paid by the State under the Kansas public employees retirement system (K.S.A. 74-4901 *et seq.* and amendments thereto) and the Kansas Police and Firemen's Retirement System (K.S.A. 74-4951 *et seq.* and amendments thereto) have been specifically exempt from state income taxation during each year from at least 1984 through the present. In addition, amounts received as annuities under the federal civil service retirement system; amounts received by retired railroad employees as supplemental annuity benefits; and amounts received by retired employees of a city and by retired employees of any board of such city in accordance with K.S.A. 13-14,106 or exemptions therefrom, have been likewise exempt from state income taxation, under the provisions of K.S.A. 79-32,117(c) and amendments thereto, during each year from at least 1984 through the present.

21. The retirement, pension and/or annuity benefits referenced in Paragraph 20 above will remain exempt from Kansas state income taxation for the indefinite future absent a change in state law. Likewise, the federal retirement benefits received by Plaintiffs will remain subject to such state income taxation for the indefinite future absent an authoritative judicial decree or other change in state law.

22. Such inconsistent treatment of retirement benefits for state income tax purposes constitutes discriminatory taxation which is neither directly related to nor justified by significant differences between the classes of retirees. Consequently, state

income taxation of Plaintiffs' federal retirement benefits violates 4 U.S.C. § 111 and constitutional principles of intergovernmental tax immunity as discussed and applied in *Davis v. Michigan Department of Treasury*, No. 87-1020, 57 U.S.L.W. 4389 (U.S. Sup.Ct., Mar. 28, 1989).

23. Pursuant to K.S.A. 60-223, Plaintiffs seek to represent the class of all persons similarly situated which is identified and defined in Paragraph 12 above. Plaintiffs are all members of the proposed class; their claims are typical of the claims of all class members; and they will fairly and adequately represent and protect the interests of all class members.

24. Since the proposed class identified in Paragraph 12 above consists of more than 10,000 retired members of the federal armed forces and, where applicable, their respective spouses, joinder of all such class members is impracticable. Moreover, questions of law and fact common to members of the class predominate over any questions affecting individual members, and a class action is superior to all other available methods for securing a fair and efficient adjudication of this controversy.

COUNT I - DEPRIVATION OF FEDERAL CIVIL RIGHTS

25. The allegations articulated in Paragraphs 1 through 24 above are hereby incorporated by reference as though fully set forth herein.

26. Defendants State of Kansas and Department of Revenue; and Defendants Governor Hayden, Secretary Rolfs, and Direct Luttjohann, in their official capacities and through various officers, agents and employees of the state; all acting pursuant to and otherwise under the color of state law, have subjected Plaintiffs or caused Plaintiffs to be subjected to the deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States in violation of the Fourteenth Amendment and 42 U.S.C. § 1983.

27. As a result of such deprivation of federally-protected civil rights, privileges or immunities, Plaintiffs and the class they seek to represent have suffered substantial and irreparable damages, for which there is no adequate remedy at law, and will continue to suffer such damages absent permanent injunctive relief which prohibits the State of Kansas, Department of Revenue, the Governor, the Secretary of Revenue and/or the Director of Taxation from taking any direct or indirect action to subject Plaintiffs' federal retirement benefits to Kansas state income taxation.

COUNT II - DEPRIVATION OF STATE CONSTITUTIONAL RIGHTS

28. The allegations articulated in Paragraphs 1 through 24 above are hereby incorporated by reference as though fully set forth herein.

29. The Constitution of the State of Kansas, Article 11, Section 2 implicitly prohibits Defendants from levying and collecting taxes on income based upon arbitrary, capricious and discriminatory classifications.

30. Under the circumstances described herein, Plaintiffs allege that state income taxation of their federal retirement benefits, including the levying and collection of such taxes, subjects them to unequal treatment and is impermissibly based upon arbitrary, capricious and discriminatory classifications in violation of KAN. CONST., art. 11 § 2.

31. As a result of such deprivation of state civil rights, privileges or immunities, Plaintiffs and the class they seek to represent have suffered substantial and irreparable damages, for which there is no adequate remedy at law, and will continue to suffer such damages absent permanent injunctive relief which prohibits the State of Kansas, Department of Revenue, the Governor, the Secretary of Revenue and/or the Director of Taxation from taking any direct or indirect action to subject

Plaintiffs' federal retirement benefits to Kansas state income taxation. Moreover, Plaintiffs and the class they seek to represent are entitled to a refund, together with appropriate interest at the rate of 12% per year from the date(s) of overpayment, of all discriminatory state income taxes collected from 1984 through the present.

COUNT III - DECLARATORY JUDGMENT

32. The allegations articulated in Paragraphs 1 through 31 above are hereby incorporated by reference as though fully set forth herein.

33. An actual case and controversy exists between the parties under the provisions of K.S.A. 60-1701 *et seq.* regarding the arbitrary and discriminatory taxation of Plaintiffs' federal retirement benefits under the Kansas Income Tax Act. Absent judicial declaration that the state income tax act is unconstitutional as applied and that federal armed forces retirees are exempt from paying state income tax on their federal retirement benefits, Plaintiffs and the class they seek to represent will continue to suffer substantial and irreparable injuries and damages, now and in the future.

COUNT IV - ACCOUNTING AND REFUND OF STATE INCOME TAXES ON FEDERAL RETIREMENT BENEFITS

34. The allegations articulated in Paragraphs 1 through 24, Paragraphs 28 through 31 and Paragraph 33 above are hereby incorporated by reference as though fully set forth herein.

35. Defendants State of Kansas, Kansas Department of Revenue, the Governor of the State of Kansas, the Secretary of Revenue and/or the Director of Taxation have subjected Plaintiffs and the class they seek to represent to arbitrary and discriminatory income taxation of federal retirement benefits since at least 1984. At all times pertinent hereto, acting under the supervision of the

Governor and the Secretary of Revenue, the Director of Taxation has collected, received and disposed of income tax revenues from said federal retirement benefits for and on behalf of the State; and Plaintiffs, including the class they seek to represent, have paid such arbitrary and discriminatory state income taxes on such federal retirement benefits.

36. Under the circumstances presented, Plaintiffs and the class they seek to represent are entitled to an accounting of all such discriminatory income taxes collected from 1984 through the present and to a refund, together with appropriate interest at the rate of 12% per year from the date(s) of overpayment, of all such monies.

37. While Plaintiffs acknowledge the existence of certain administrative remedies to obtain state income tax refunds, such administrative mechanisms are plainly incapable of affording Plaintiffs any relief from legislatively-imposed, albeit discriminatory, state income taxation and recourse to such procedures would be futile under the circumstances. The absence of any full and effective administrative remedy therefore excuses Plaintiffs and the class they seek to represent from any requirement which might otherwise exist to pursue and/or exhaust any such administrative mechanisms.

38. Plaintiffs and the class they seek to represent are entitled to state income tax refunds, together with interest, in a substantial amount which probably exceeds $1,000,000.00 per year for each tax year from 1984 through the present.

PRAYER FOR RELIEF

WHEREFORE, premises considered, Plaintiffs pray for the following relief:

A. That the Court determine, as soon as practicable, that this case is a proper class action; that Plaintiffs are proper class representatives; and that no notice of this action need be

given to members of the class represented by these named plaintiffs, all in accordance with K.S.A. 60-223;

B. That the Court issue its judicial declaration that the Kansas Income Tax Act is unconstitutional as applied to Plaintiffs' federal retirement benefits; that Defendants, under the color of state law, have wrongfully subjected Plaintiffs or caused Plaintiffs to be subjected to arbitrary and discriminatory income taxation in violation of the Constitution and laws of the United States from at least 1984 through the present; that Plaintiffs' federal retirement benefits have been and continue to be exempt from state income taxation under the circumstances; that Plaintiffs are not required to pay state income taxes on their federal retirement benefits in the future; and that Plaintiffs are entitled to a refund of all discriminatory state income tax revenues paid and/or collected since 1984 in connection with their federal retirement benefits, together with appropriate interest at the rate of 12% per year until paid in full;

C. That the Court enter a permanent injunction prohibiting the State of Kansas, the Kansas Department of Revenue, the Governor of the State of Kansas, the Secretary of Revenue of the State of Kansas, the Director of Taxation of the State of Kansas and all other officers, agents and employees of the State from levying, assessing and/or collecting state income taxes on Plaintiffs' federal armed forces retirement benefits;

D. That the Court order the Kansas Department of Revenue, the Secretary of Revenue of the State of Kansas and/or the Director of Taxation of the State of Kansas to account to Plaintiffs and the class they seek to represent for all state income tax revenues collected or received since 1984 because of such taxation of Plaintiffs' federal retirement benefits;

E. That the Court enter judgment for Plaintiffs and the class they seek to represent, and against Defendants State of Kansas, Kansas Department of Revenue, the Secretary of Revenue of the State of Kansas and/or the Director of Taxation of the State

of Kansas for state income tax refunds to which Plaintiffs and Plaintiff class are entitled for each tax year from 1984 through the present, together with interest, in a total amount exceeding $10,000.00; and

F. That the Court award Plaintiffs their costs, including reasonable attorney fees under 42 U.S.C. § 1988, and such other and further relief as may be deemed just and equitable under the circumstances.

* * * * * * * *

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION 4

AMENDED JOINT MOTION FOR CLASS CERTIFICATION

Filed October 24, 1989
[Caption Omitted in Printing]

Pursuant to the provisions of K.S.A. 60-223, all Plaintiffs in this consolidated action [Case No. 89-CV-666 and Case No. 89-CV-1100] respectfully move this Honorable Court for an order: (1) certifying this consolidated litigation as a class action; (2) naming all Plaintiffs as class representatives; (3) defining the Plaintiff Class as:

> All retired members of the federal or United States armed forces who are recipients of federal armed forces retirement benefits (under applicable provisions of Title 10 or Title 14 of the United States Code) subject to Kansas state income taxation during one or more of the tax years from 1984 through 1989 and, where applicable, their respective spouses who have filed or will file joint

> Kansas state income tax returns during one or more of the tax years from 1984 through 1989;

and (4) designating class counsel as the law firms of FRIEDEN, HAYNES & FORBES of Topeka, NIEWALD, WALDECK, NORRIS & BROWN of Overland Park, and DAVIS, BEALL, MCGUIRE & THOMPSON of Leavenworth.

This amended motion is identical to Plaintiffs' original Joint Motion for Class Certification except for the addition of the phrase "or Title 14" to the definition of our proposed Plaintiff Class. While Coast Guard personnel are members of the federal armed forces under Title 10 of the United States Code [*see* 10 U.S.C. § 101(4)] whose retirement pay is determined, in whole or in part, under 10 U.S.C. §§ 1405, 1407 and/or 1409, Plaintiffs' counsel recently learned that Coast Guard retirement benefits are actually payable under Title 14 of the United States Code. *See, e.g.*, 14 U.S.C.A. §§ 421 and 423 (1989 Cum. Ann. Pocket Pt.). This purely technical amendment to our class definition is necessary to clarify and ensure that retired members of the Coast Guard who received federal armed forces retirement benefits are included within the Plaintiff Class proposed herein.

For the reasons articulated in our Memorandum in Support of Plaintiffs' Joint Motion for Class Certification (filed September 28, 1989), Plaintiffs respectfully submit that the requirements of K.S.A. 60-223 are satisfied and that this consolidated litigation should be certified and maintained as a class action.

WHEREFORE, premises considered, Plaintiffs jointly pray that this motion be granted.

* * * * * * * *

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION 4

JOURNAL ENTRY DISMISSING GOVERNOR MIKE HAYDEN AS A PARTY DEFENDANT IN CASE NO. 89-CV-666

Filed November 1, 1989
[Caption Omitted in Printing]

NOW on this 1st day of November, 1989, Case No. 89-CV-666 is before the Court on a joint motion to dismiss Governor Mike Hayden as a party defendant herein. Plaintiffs in Case No. 89-CV-666 appear by and through their attorney, John C. Frieden of FRIEDEN, HAYNES & FORBES; Intervenor/Plaintiff Anthony E. Corcoran appears by and through his attorney, Kenton C. Granger of NIEWALD, WALDECK, NORRIS & BROWN; and Defendant Governor Mike Hayden appears by and through his attorney, Assistant Attorney General Mary K. Wettig. There are no other appearances.

WHEREUPON, after reviewing the pleadings and being otherwise well and fully advised in the premises, for good cause shown, the Court finds and concludes, pursuant to the provisions of K.S.A. 60-223(e) and K.S.A. 60-241(a)(2), that Defendant Governor Hayden should be and is hereby dismissed from Case No. 89-CV-666 upon the following terms and conditions:

1. Governor Hayden agrees to be bound by any injunctive relief which may be issued by the Court herein;

2. Dismissal of Governor Hayden will not prejudice the rights of appeal of any party in Case No. 89-CV-666 nor will it affect or prejudice Plaintiffs' rights to seek an award of attorney's fees under 42 U.S.C. § 1988 against any remaining parties defendant; and

3. Each and every named Plaintiff in Case No. 89-CV-666 and Governor Hayden mutually covenant not to sue each other or otherwise pursue any claim for attorney's fees under 42 U.S.C. § 1988 which might exist in connection with the subject-

matter of this action; and that said covenant shall not affect or prejudice Plaintiffs' rights to seek an award of attorney's fees under 42 U.S.C. § 1988 against Defendants State of Kansas, Kansas Department of Revenue, Secretary of Revenue Ed Rolfs and/or Director of Taxation John Luttjohann.

The Court further finds and concludes that dismissal of Defendant Governor Hayden will not interfere with the orderly progress of this action nor will it prejudice the interests of Plaintiffs and the class they seek to represent.

IT IS SO ORDERED.

Entered this 1st day of November, 1989, at Topeka, Kansas.

Adrian J. Allen
District Court Judge

* * * * * * * *

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION 4

JOURNAL ENTRY

Filed December 19, 1989
[Caption Omitted in Printing]

NOW on this 13th day of November, 1989, the above-captioned consolidated action is before the Court, pursuant to notice, for hearing and disposition of Defendants' motions to dismiss and Plaintiffs' amended joint motion for class certification. Plaintiffs in Case No. 89-CV-666 appear by their attorneys, John C. Frieden and Kevin M. Fowler; Plaintiff/Intervenor Corcoran appears by his attorneys, Kenton C. Granger and Angela K.

Green; Plaintiffs in Case No. 89-CV-1100 appear by their attorney, Terence A. Lober; and Defendants appear by their attorneys, James Bartle and Mark Burghart. There are no other appearances.

WHEREUPON, after reviewing the pleadings, memoranda, affidavits, documents of record, hearing the arguments of counsel, and being otherwise well and fully advised in the premises, the Court issues the following Findings of Fact and Conclusions of Law:

I

FINDINGS OF FACT

1. The statements of fact set forth in the Affidavit of Keyton E. Barker, Jr., Affidavit of Pauline Barker, Affidavit of William E. Richards, Affidavit of Ollun E. Richards, Affidavit of John G. Fowler, Affidavit of Carol B. Fowler, Affidavit of Leonard W. Williams, Affidavit of Loneta S. Williams, Affidavit of Clarence Wolf, Affidavit of Flora B. Wolf, Affidavit of Anthony E. Corcoran, Affidavit of Leland W. Keister, Jr., Affidavit of Roger J. Olson, Affidavit of Edward F. Kellogg, Affidavit of Joseph Marshall, Affidavit of John Luttjohann, Affidavit of Kevin M. Fowler and Affidavit of John C. Frieden, each of which is duly filed with the Court without objection by the parties, are accepted as true for purposes of Defendants' motions to dismiss and Plaintiffs' joint motion for class certification, and are hereby incorporated by reference as though fully articulated herein.

2. The parties have also executed a Stipulation of Authenticity of Specific Documents which was filed with the Court on November 9, 1989. The Court does hereby accept this stipulation and finds that the documents attached thereto are authentic.

3. Based upon *Davis v. Michigan Department of Treasury*, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), 4 U.S.C. §

111 and the Supremacy Clause of the United States Constitution, the Privileges and Immunities Clause of the Fourteenth Amendment, and Article 11, § 2 of the Kansas Constitution, all named Plaintiffs and the class they seek to represent allege that Kansas state income taxation of military retired pay, as legislatively imposed under the Kansas Income Tax Act [K.S.A. 79-3201 *et seq.* as amended], is unconstitutional. None of the parties have offered or identified any non-constitutional basis for decision.

4. The proposed class involved in these consolidated proceedings consists of all retired members of the federal or United States armed forces who are recipients of federal armed forces retirement benefits [under applicable provisions of Title 10 or Title 14 of the United States Code] subject to Kansas state income taxation during one or more of the tax years from 1984 through 1989 and, where applicable, their respective spouses who have filed or will file joint Kansas state income tax returns during one or more of the tax years from 1984 through 1989. There are approximately 14,100 members of this class and joinder of all members is impracticable.

5. There are questions of law and fact common to each member of the class. Moreover, the claims of all named Plaintiffs are typical of the claims of the class, to wit: Whether Kansas state income taxation of military retired pay violates our federal and/or state constitutions.

6. Plaintiffs' counsel [FRIEDEN, HAYNES & FORBES; NIEWALD, WALDECK, NORRIS & BROWN, P.C.; and DAVIS, BEALL, MCGUIRE & THOMPSON, Chartered] are qualified, experienced and capable of conducting the proposed class action litigation. In addition, the conduct of these proceedings demonstrates that the current parties are not involved in a collusive suit and there is no evidence of record which suggests otherwise.

7. The interests of the named Plaintiffs do not conflict

with nor do they appear to be antagonistic in any way with the interests of other members of the class. Likewise, Plaintiffs' interests in the subject-matter are at least co-extensive with the interests of other members of the class.

8. The named parties Plaintiff in these consolidated proceedings, with the assistance of their attorneys, will adequately represent and protect the interests of the class involved herein; and all such named Plaintiffs should be designated as class representatives. Furthermore, the law firms of FRIEDEN, HAYNES & FORBES; NIEWALD, WALDECK, NORRIS & BROWN; and DAVIS, BEALL, MCGUIRE & THOMPSON, should be designated as class counsel.

9. Defendants have conceded that neither the Director of Taxation of the State of Kansas nor the Board of Tax Appeals ["BOTA"] is authorized or empowered to grant any Plaintiff or class member any relief from Kansas income taxation at issue in these proceedings. Defendants therefore have acted and refused to act on grounds generally applicable to the class.

10. Separate actions by individual class members would create a risk of individual adjudications which would, as a practical matter, dispose of the interests of non-parties similarly situated or substantially impede or impair the ability of such non-parties to protect their interests.

11. Under the circumstances presented, pursuit and exhaustion of existing administrative remedies by any Plaintiffs and members of the class involved herein would be futile. Moreover, the limited state income tax refund remedy is inadequate and the administrative process is fraught with lengthy delays that will serve no useful purpose.

II
CONCLUSIONS OF LAW

1. This Court has judicial power and such jurisdiction

in its respective district as may be provided by law. KAN. CONST., art. 3 at §§ 1 and 6(b). The broad scope of such authority has been specified by the Kansas Legislature in K.S.A. 20-301, which grants this Court "general original jurisdiction of all matters, both civil and criminal, unless otherwise provided by law, and also . . . such appellate jurisdiction as prescribed by law." Since the power to decide the subject-matter of this civil action has not been expressly withheld nor ceded exclusively to another tribunal, this Court has original jurisdiction.

2. Exhaustion of administrative remedies may be required in tax matters where there exists a full and adequate administrative remedy provided by statute. However, exhaustion is not required where the remedy is inadequate or recourse to the administrative process would be futile. In this case, application of the exhaustion doctrine is not appropriate because the administrative process is incapable of providing any Plaintiff and member of the class with any form of relief. The only available administrative remedy [e.g., the income tax refund mechanism] is therefore inadequate and pursuit of this remedy would be futile.

3. Application of the exhaustion doctrine is also not appropriate in this case because the questions presented are inherently judicial, they do not involve administrative discretion and they do not require administrative expertise. Consequently, administrative fact finding and proceedings will not assist the Court in resolution of the issues presented for decision.

4. Plaintiffs have filed proper petitions, affidavits and documents sufficient to establish a prima facie set of facts sufficient to warrant certification of these proceedings as a class action under the provisions of K.S.A. 60-223(a), (b)(1), and (b)(2). The Court therefore certifies these consolidated proceedings as a class action under K.S.A. 60-223(b)(1) and (b)(2); designates all named Plaintiffs as class representatives; defines the Plaintiff class as:

All retired members of the federal or United

> States armed forces who are recipients of federal armed forces retirement benefits [under applicable provisions of Title 10 or Title 14 or the United States Code] subject to Kansas state income taxation during one or more of the tax years from 1984 through 1989 and, where applicable, their respective spouses who have filed or will file joint Kansas state income tax returns during one or more of the tax years from 1984 through 1989;

and designates class counsel as the law firms of FRIEDEN, HAYNES & FORBES; NIEWALD, WALDECK, NORRIS & BROWN, P.C.; and DAVIS, BEALL, MCGUIRE & THOMPSON, Chartered.

5. No notice of this Order shall be required, but a copy hereof shall be attached to any class notices which may be hereafter required by the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' motions to dismiss should be and are hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs' amended joint motion for class certification should be and is hereby granted.

DATED this 19th day of December, 1989.

Adrian Allen
District Court Judge

* * * * * * *

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION 4

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THE QUESTION OF LIABILITY

Filed February 23, 1990
[Caption Omitted in Printing]

Pursuant to the provisions of K.S.A. 1989 Supp. 60-256(c), the designated Plaintiff Class as a whole and all named Plaintiffs, individually and as designated class representatives in these consolidated class action proceedings, hereby move the Court for summary judgment on the legal question of whether Kansas state income taxation of federal military retired pay, as legislatively imposed under the Kansas Income Tax Act [K.S.A. 79-3201 *et seq.* and amendments thereto] is unconstitutional because it violates 4 U.S.C. § 111 and the Supremacy Clause of the Constitution of the United States, the constitutional doctrine of intergovernmental tax immunity, the Privileges and Immunities Clause of the Fourteenth Amendment, and Article 11, § 2 of the Constitution of the State of Kansas. Plaintiffs also request entry of a permanent injunction prohibiting any and all Defendants [including their agents and employees] from enforcing any state income tax levy or assessment against federal military retired pay until and unless such federal retirement benefits are treated in the same manner as state and local retirement benefits under the Kansas Income Tax Act. Finally, Plaintiffs seek a summary determination of their entitlement to a refund, plus statutory interest, of income taxes paid under the State's unconstitutional tax scheme for all tax years from 1984 through the present.

For the reasons articulated in the Memorandum in Support of Plaintiffs' Motion for Summary Judgment on the Question of Liability filed contemporaneously herewith, Plaintiffs respectfully submit that the judgment sought should be rendered forthwith since there are no genuine issues as to any material fact and we are entitled to such judgment as a matter of law.

Plaintiffs request oral argument on this motion at the earliest possible opportunity.

* * * * * * * *

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION 4

AFFIDAVIT OF SUSAN IRZA

Filed April 16, 1990
[Caption Omitted in Printing]

STATE OF KANSAS, COUNTY OF SHAWNEE, SS:

SUSAN IRZA, of lawful age, being first duly sworn on her oath, alleges and states as follows:

1. I am employed by the Kansas Department of Administration as the Director of the Division of Personnel Services.

2. My responsibilities and duties as Director include developing effective personnel administration within all agencies in the state.

3. The Department of Administration is statutorily charged with the administration of all personnel matters regarding persons employed by the state of Kansas in the state civil service system.

4. My official duties and responsibilities require me to be knowledgeable of the personnel requirements of the state civil service system.

5. Upon their retirement, retired state employees are completely severed from employment obligations with the state of Kansas.

6. The state of Kansas has no authority, policy, or procedure to recall retired state employees to employment with the state under any circumstances.

7. The state of Kansas has personnel procedures and disciplinary rules and regulations for its employees. However, retired state employees are not subject to such procedures, rules and regulations.

8. Retired state employees are not subject to restrictions on post-retirement activities, except as to a limited exception regarding re-employment with the state and reduction of KPERS retirement benefits if the current earned compensation exceeds $6,000.00 in a calendar year.

9. Retired state employees are not provided with free hospitalization, health, or dental care by the state of Kansas. State retirees may continue to purchase group health insurance through the state and are responsible for the full cost of such health insurance.

10. The state of Kansas does not operate special stores where current or retired state employees can purchase items at reduced prices or without paying sales tax on their purchases.

11. The state of Kansas does not provide free or reduced fare transportation on aircraft for retired state employees as part of its retirement system.

FURTHER AFFIANT SAITH NOT.

* * * * * * *

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION 4

AFFIDAVIT

Filed April 16, 1990
[Caption Omitted in Printing]

I, Judy A. Lambert, of lawful age, being first duly sworn, hereby state as follows:

1. I am employed by the Kansas Public Employees Retirement System (KPERS) as Chief of Member Services.

2. My duties and responsibilities as Chief of Member Services include managing and directing the operations of the division pertaining to member services. These operations include, but are not limited to, calculation of members' benefits (including retirement benefit payments), maintenance of members' records, preparation of annual statements of members' accounts, and preparation of necessary tax forms.

3. KPERS is an organization created by law to administer the retirement systems of all participating employers, including the retirement system for employees of the state of Kansas and its political subdivisions, teachers and school employees, and the Kansas Police and Firemen's Retirement System.

4. My official duties and responsibilities require me to be familiar with and knowledgeable of the administration of KPERS and the rules, regulations, and laws pertaining to the organization.

5. KPERS retirement benefits are funded by regular employee contributions, employer contributions, and interest and earnings on the invested contributions. Employee contributions are deducted from gross pay each payroll period at the prescribed statutory rate. Employer contributions are funded annually.

6. State employees are required by law to participate

in and make contributions to KPERS after working for the state for one year.

7. Regular contributions to KPERS made by state employees are subject to Kansas income tax in the year in which they are made.

8. A state employee may withdraw his KPERS contributions together with interest accrued thereon, after terminating employment with the state. Employer contributions remain with the fund.

9. Retired state employees cannot receive the full amount of their KPERS benefits until they are 65 years of age, unless they are 60 and have 35 years of service, or at any age if they have 40 years of service.

10. State employees with 10 years of service can retire as early as age 55, but their monthly benefit payments will be substantially reduced. Such employees do not receive an increase in benefits when they reach age 65.

11. Retired state employees are not subject to restrictions on their post-retirement activities as a condition to receiving KPERS benefits. However, if a retirant who retired on or after July 1, 1988, is reemployed by the state and earns more than $6,000 in a calendar year, KPERS benefits will be suspended if he or she continues to work for the state. This provision does not apply to retirants retiring before July 1, 1988.

12. KPERS retirement benefits are deferred compensation for the past services rendered. Retirants are not required to perform additional services or duties to receive KPERS retirement benefits.

13. There is no automatic cost of living increase in KPERS retirement benefit payments based on the consumer price index or any other formula.

14. KPERS nonschool average annual retirement benefit payment in 1986 was $4,008.

15. Generally, it takes 2 to 3 years for a retirant to receive an amount equal to his contributions through retirement benefit payments.

FURTHER AFFIANT SAITH NOT.

* * * * * * * *

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION 4

MEMORANDUM DECISION AND ORDER

Filed October 31, 1990

This matter comes before the Court on plaintiffs' motion for summary judgment on the issue of liability. The defendants have responded to plaintiffs' motion and have also moved for summary judgment on the issue of whether the defendants can be held liable under 42 U.S.C. § 1983.

All named plaintiffs served at least twenty (20) years in the United States Armed Forces which include the Army, Navy and Air Force. They have been noncommissioned and commissioned officers. All named plaintiffs are Kansas residents who have paid and continue to pay Kansas income taxes. Named plaintiffs represent a certified class of approximately 14,000 federal military retirees in the State of Kansas. *Journal Entry* at 3, para. 4 (Dec. 19, 1989).

Plaintiffs brought this action challenging the Kansas Income Tax Act (KITA) (K.S.A. § 79-3201 *et seq.*) claiming it discriminates against federal military retirees and therefore, is

unconstitutional because it violates 4 U.S.C. § 111 and the Supremacy Clause of the United States Constitution, the constitutional doctrine of intergovernmental tax immunity, the Privileges and Immunities Clause of the Fourteenth Amendment, and article XI, § 2 of the Kansas Constitution. *Second Amended Petition* at 9 & 11 (Sept. 22, 1989). Plaintiffs allege defendants deprived plaintiffs of their civil rights in violation of the United States Constitution, the Fourteenth Amendment and 42 U.S.C. § 1983. *Id.* at 10.

Plaintiffs also request a refund of Kansas income taxes since 1984, with interest, which are allegedly overpayments. *Id.* at 13. Plaintiffs have preserved their right to a refund by the order of this Court which recognized that plaintiffs could not receive the relief sought from the administrative process due to the Kansas Department of Revenue's inability to declare a state statute unconstitutional. *Journal Entry* at 5-6, para. 2 & 3 (Dec. 19, 1989).

CONCLUSIONS OF LAW

Federal income tax is based upon the taxpayer's federal adjusted gross income pursuant to provisions of the Internal Revenue Code. *See* 26 U.S.C. §§ 61 to 134. Federal adjusted gross income includes federal military retired pay, federal civil service retirement pay and retirement benefits paid to the States' civil service retirees, such as retired members of the Kansas Public Employees Retirement Systems.

Kansas income tax is based upon the taxpayer's Kansas adjusted gross income. An individual's federal adjusted gross is modified pursuant to K.S.A. § 79-32,117 to calculate his Kansas adjusted gross income. To arrive at an individual's Kansas adjusted gross income, his federal adjusted gross income is reduced by the amount received from the federal civil service retirement and disability fund, amounts received by retired railroad employees as a supplemental annuity, and amounts received from the Kansas Employee Retirement Systems by retired members.

K.S.A. §§ 79-32,117(c) (1989) and 74-4924 (1985). The Kansas adjusted gross income includes the amount received from military retired pay and therefore, military retirees pay taxes on military retired pay. *See* K.S.A. § 79-32,117 (1989).

Plaintiffs brought this action challenging the Kansas Income Tax Act and request tax refunds as a response to the United States Supreme Court decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). In *Davis*, the plaintiff, a retired Federal Government employee receiving federal civil service retirement benefits, challenged the Michigan state income tax. The Michigan state income tax act taxed federal civil service retirement benefits while exempting state civil service retirement benefits. Therefore, the plaintiff claimed the Michigan income tax scheme was unconstitutional under the doctrine of intergovernmental tax immunity and 4 U.S.C. § 111.

The doctrine of intergovernmental tax immunity has its roots in *McCulloch v. Maryland*, 4 Wheat 316, 4 L.Ed. 579 (1819), which held a state could not impose a discriminatory tax on an agent of the United States and thereby, indirectly tax the Federal Government. This doctrine was more fully developed in *Helvering v. Gerhart*, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427 (1938), and in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927 (1939). In *Helvering* the Supreme Court held that the Federal Government could levy nondiscriminatory taxes on the incomes of most state employees. The Supreme Court in *Graves* held federal employees were subject to nondiscriminatory taxes levied by the States. "After *Graves*, therefore, intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt." *Davis*, 103 L.Ed.2d at 902.

The principle of allowing States to tax the Federal Government "or those with whom it dealt" as long as the tax did not discriminate against the Federal Government was codified in

part by 4 U.S.C. § 111. This statute was passed between the announcements of *Helvering* and *Graves* and states in pertinent part "[t]he United States consents to the taxation of pay or compensation for personal services as [a federal employee], . . ., by a duly constituted taxing authority having jurisdiction, *if the taxation does not discriminate* against the officer or employee *because of the source* of the pay or compensation." (Emphasis added). After determining that 4 U.S.C. § 111 applies to retired as well as current federal employees, the Supreme Court in *Davis* states "the relevant injury is whether the inconsistent tax treatment is directly related to and justified by 'significant differences between the two classes.'" *Davis*, 103 L.Ed.2d at 905 [citing *Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376, 383, 80 S.Ct. 474, 4 L.Ed.2d 384 (1960)].

Michigan raised the defenses of the State's interest in attracting employees by favoring its employees through tax benefits and the fact that as a general rule Federal Government retirees receive greater retirement benefits than Michigan's civil service retirees. The Supreme Court held these differences did not prove a substantial difference between the two classes which would justify a discriminatory tax treatment. *Davis*, 103 L.Ed.2d at 905-06. There are equal protection problems with the first argument. Additionally, if Michigan wished to tax retirees receiving high retirement benefits then the State's tax would be based on amount rather than source. Therefore, the United States Supreme Court declared the Michigan income tax statute unconstitutional. *Davis*, 103 L.Ed.2d at 906.

Unfortunately the *Davis* case does not provide any further guidance on what would amount to "significant differences" which justifies different tax treatment. This Court must start with the presumption that the Kansas Income Tax Act (KITA) is constitutional. *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 340, 757 P.2d 251 (1988) [citing *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748, 408 P.2d 877 (1965)]. In order to decide the issue currently before this Court, whether the KITA violates 4 U.S.C. § 111 and the doctrine of intergovernmental tax

immunity, the Court must examine the military non-disability retired pay and compare it to the Kansas state employee retirement system. All branches of the Armed Forces are governed by similar provisions and therefore, for the sake of this analysis this Court will cite to the statutes which regulate the United States Army.

Title 10 of the United States Code includes several provisions which regulate Army retirees: (1) the Regular Army includes retired officers and enlisted men, 10 U.S.C. § 3075(b)(3); (2) retired officers of the Army may wear their uniform while not on active duty, 10 U.S.C. § 772(c); (3) any retired member of the Regular Army is subject to recall to active duty, 10 U.S.C. §§ 688(a) and 3504(a); (4) retired members of the Armed Forces who are entitled to pay are subject to the Uniform Code of Military Justice and court-martial jurisdiction, 10 U.S.C. §§ 802(a) and 817(a); (5) officers and enlisted men may retire after 20 years of service, *see e.g.*, 10 U.S.C. §§ 3911, 3914; (6) during their service, members of the Armed Forces do not make contributions to a retirement or pension fund from which their retired pay is later drawn, *McCarty v. McCarty*, 453 U.S. 210, 214, 101 S.Ct. 2728, 69 L.Ed.2d 589, 594 (1981); (7) military retirees may lose or have their retired military pay reduced if they become an employee of the federal civil service, 5 U.S.C. § 5532.

When considering this system of military retired pay, the United States Supreme Court concluded retired Army officers "are then by law a part of the army." *United States v. Tyler*, 15 Otto 244, 105 U.S. 244, 26 L.Ed. 985 (1881). The Supreme Court further stated:

> It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, . . ., are still *not* in the military service.

Tyler, 105 U.S. at 246, 26 L.Ed. at 986. (Emphasis in original).

The plaintiffs argue that *Tyler* should not bear on the outcome of this case because the decision is over one hundred years old. However, *Tyler* has never been overruled and was heavily relied upon in *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981). The plaintiff in *McCarty* argued his non-disability military retired pay for twenty (20) years of service in the U.S. Army should not be considered community property under California law for purposes of property distribution in his divorce proceedings. Overruling a decision by the California Court of Appeals, the United States Supreme Court agreed with the plaintiff. The Supreme Court concluded "that military retired pay is reduced compensation for reduced current services." *McCarty*, 69 L.Ed.2d at 599. The Court found the California community property law threatened grave harm to "clear and substantial" federal interests which gave the United States Supreme Court through the Supremacy Clause, U.S. Const., art. VI, cl. 2, authority to override the California law.

In contrast to the military retired pay system, the Kansas Public Employees Retirement Systems (KPERS) puts no requirements upon its retirees. The normal retirement age for a KPERS member is 65 years. K.S.A. § 74-4914(1) (Supp. 1989). Normal retirement may also occur at "age 60 with the completion of 35 years of credited service or at any age with the completion of 40 years of credited service." *Id.* In order to receive any KPERS retirement benefits, the member must have worked at least 10 years and must be at least 55 years of age. K.S.A. § 74-4914(5) (Supp. 1989). If a KPERS member should opt to retire before age 65 the amount of the benefits will be lowered thereby penalizing early retirement. K.S.A. § 74-4915(2) (Supp. 1989). KPERS members pay 4% of their compensation or wage into the KPERS fund. This contribution is credited to the member's individual account with annual interest. K.S.A. § 74-4919(a) (1985). If the employer is the State of Kansas, the employer contributes 3.1% of the employee's wage to the employee's individual account. K.S.A. § 74-49205 (Supp. 1989). Other

KPERS employers contribute 2% of the employee's wage. *Id.* These contributions, by the employee and employer, are made at the time of the worker's employment and are drawn from when the retirement benefits are paid out. Other than staying alive, no requirements or restrictions are placed on a retired KPERS members. *See* Kansas Public Employees Retirement Systems, K.S.A. § 74-4901 *et seq.*

After examining the military non-disability retired pay which is taxed by KITA and KPERS which is exempt from tax under KITA, this Court finds there are substantial differences between the two classes which justifies the disparate tax treatment. Therefore, this Court holds the Kansas Income Tax Act is not unconstitutional nor in violation of 4 U.S.C. § 111. Viewed in toto the military retired system is unique to other retirement systems, especially in light of the fact that military retirees are subject to recall and during active service do not contribute to their retired pay. The absence of contribution during active service by military retirees or by their employer, the Federal Government, is consistent with the *Tyler* and *McCarty* decisions which state military retired pay is reduced compensation for reduced current services.

Plaintiffs argue that the characterization of military retired pay of *Tyler* and *McCarty* should not apply due to the enactment of the Uniform Services Former Spouses Protection Act, 10 U.S.C. § 1408 and its Kansas equivalent K.S.A. § 23-201(b). After the *McCarty* decision, Congress passed the Uniform Services Former Spouses Protection Act which permits States to treat military retired pay as marital property for purposes of marital dissolution. This enactment was a policy decision by Congress and designed to treat former spouses of military retirees more equitably. In 1987, Kansas amended its Married Persons Act to treat military retired pay as marital property for purposes of divorce, separate maintenance, and annulment. K.S.A. § 23-201 (1988). Prior to this amendment, Kansas had held that military retired pay was not marital property and was nothing more than a future stream of income which will cease at the death of the

retiree. *Grant v. Grant*, 9 Kan.App.2d 671, 676, 685 P.2d 327 (1984) [citing *Powell v. Powell*, 231 Kan. 456, 648 P.2d 218 (1982)].

This Court agrees with the defendants that while the Uniform Services Former Spouses Protection Act permitted States to treat military retired pay as marital property, it did not change the legal characterization of military retired pay for any other purpose. *See also Cornetta v. U.S.*, 851 F.2d 1372, 1382 n.3 (Fed. Cir. 1988) ("the legislation did not affect the characterization of military retired pay as reduced compensation for reduced current services"). Plaintiffs argue the Supremacy Clause applies to the case at bar and therefore, this Court must find the KITA unconstitutional under *Davis* and 4 U.S.C. § 111. Certainly the Supremacy Clause applies, however, this Court finds that due to the United States Supreme Court's characterization of military retired pay as reduced compensation for reduced current services the KITA must be found constitutional.

Plaintiffs have also brought to the attention of this Court decisions from other state courts which have addressed actions brought by military retirees resulting from the *Davis* decision. *See e.g., Hackman v. Director of Revenue*, 771 S.W.2d 77 (*cert. denied* 110 S.Ct. 718) (Mo. banc 1989); *Bohn v. Waddell*, 164 Ariz. 74, 790 P.2d 772 (1990). These decisions, which held various States taxation of military retired pay was unconstitutional, are not controlling and this Court is not persuaded by them.

The Court has considered all other issues raised by the parties and finds them to be without merit.

CONCLUSION

The Court finds the Kansas Income Tax Act to be constitutional. Plaintiffs' Motion for Summary Judgment on the Question of Liability is denied.

This action does not involve a genuine issue as to any

material fact and therefore, the Court grants summary judgment to the defendants on its own motion. *Phillips v. Carson*, 240 Kan. 462, syl. 3, 731 P.2d 820 (1987).

In light of the findings of the Court, defendants' request for summary judgment on the issue of whether the defendants can be held liable under 42 U.S.C. § 1983 is moot.

This Memorandum Decision and Order shall serve as the Journal Entry.

Dated this 31st day of October, 1990.

Adrian J. Allen
Judge of the District Court

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IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION 4

NOTICE OF APPEAL

Filed October 31, 1990
[Caption Omitted in Printing]

Pursuant to the provisions of K.S.A. 60-2101(a) and Kansas Supreme Court Rule 2.02, notice is hereby given that all named Plaintiffs and Intervenor/Plaintiff in Case No. 89-CV-666 and all named Plaintiffs in Case No. 89-CV-1100, for themselves and on behalf of the Plaintiff Class designated by Journal Entry filed December 19, 1989, appeal the Memorandum Decision and Order issued by this Court on October 31, 1990 to the Court of Appeals of the State of Kansas.

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